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Thiagrajen a/l Veluchamy v Suraish Naidu a/l RE Naidu & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–1428 OF 2006
NALLINI PATHMANATHAN JC
3 JUNE 2009

Contract — Oral agreement — Existence of oral agreement — Offer and/or proposal, evidence of — Intention of parties, evidence of — Whether oral contract in existence

Contract — Oral agreement — Specific performance — Whether oral contract in existence — Whether specific performance appropriate remedy — Whether damages in lieu of specific performance ought to be primary remedy — Specific Relief Act 1950 s 18(2)

Contract — Specific performance — Damages in lieu of specific performance — Breach of oral contract by defendant — Defendant unwilling and/or unable to work with plaintiff any longer — Whether proper for court to award damages in lieu of specific performance

The plaintiff alleged that he had entered into an oral contract with the first defendant ('D1') whereby D1 agreed to sell 50% of his shareholding in the second defendant ('D2') to the plaintiff for a sum of RM150,000. In breach of that oral contract, D1 refused to sell the 50% shareholding in D2 to the plaintiff at the agreed consideration of RM150,000. The plaintiff thus sought an order of specific performance from the High Court. D1 denied that there ever was such a contract between the plaintiff and himself. The High Court had thus to consider the surrounding facts, circumstances and relevant evidence to ascertain whether an oral contract could be established, since specific performance would only arise if indeed there existed such a contract.

Held, awarding damages in lieu of specific performance with costs:

(1) The plaintiff had sent an e-mail (P3) to his friend — PW2 — inter alia, setting out the terms of the offer made by D1 and specifically seeking D2's advice as to whether or not he needed to get an agreement set out

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in writing in respect of the offer which he proposed to accept. PW2 had replied through e-mail (P4) advising that there was no need for a written contract and that an oral agreement was just as valid. These two e-mails, P3 and P4 comprised evidence of the offer or proposal made by D1 to the plaintiff and the plaintiff's consideration of the same. PW2's response (P4) to the e-mail (P3) provided independent corroboration of the fact of the offer/proposal. These documents pointed towards the existence of an oral contract (see paras 6, 16 & 17).

(2) The plaintiff and D1 had registered a partnership dealing with engineering works and services. This constituted evidence of intention of the parties to set up a business together and that they intended to have an equal share in the business, which concerned engineering works. The fact that the business had not commenced could not detract from the intention of parties to commence such a business together (see para 18).

(3) On a balance of probabilities, the plaintiff had established that there existed a conditional oral contract whereby D1 agreed to sell 50% of the shares in D2 upon his acquisition of the same from one Balakrishnan, at a consideration of RM150,000. The condition precedent was the acquisition of Balakrishnan's 50% shareholding in D2. That condition precedent was satisfied on 8 August 2006 whereupon the performance of the oral contract became possible. The High Court would thus conclude that an oral contract did in fact exist between the plaintiff and D1. The fact that the exact date of the contract as stipulated by the plaintiff was not exactly accurate did not preclude the court from finding the existence of such an agreement. There was a preponderance of evidence showing the existence of such an agreement. In breach of that oral contract, D1 had clearly failed and/or refused to transfer the 50% share-holding in D2 to the plaintiff at the agreed consideration of RM150,000 (see para 31). *GN Muey Muey v Goh Poh Choo* [2000] 2 SLR 578 referred.

(4) Although the plaintiff did not abandon his claim for specific performance of the oral contract and informed the court that he could work with D1, it was obvious from the evidence of D1 that he was unable and/or unwilling to work with the plaintiff any more. In the instant case, s 18(2) of the Specific Relief Act 1950 was applicable to the facts. Since the contract had been broken but specific performance was not the appropriate remedy to be granted, the High Court would order damages in lieu of specific performance as the primary remedy/relief in the action (see paras 33 & 34).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa dia telah membuat kontrak lisan dengan

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defendan pertama ('D1') yang mana D1 bersetuju untuk menjual 50% daripada pegangan sahamnya dalam defendan kedua ('D2') kepada plaintif bagi jumlah RM150,000. Dalam pelanggaran kontrak lisan tersebut, D1 enggan menjual 50% pegangan saham dalam D2 kepada plaintif untuk balasan RM150,000 yang dipersetujui. Oleh itu plaintif menuntut satu perintah pelaksanaan spesifik daripada Mahkamah Tinggi. D1 menafikan bahawa terdapat kontrak tersebut di antara plaintif dan dirinya. Oleh itu Mahkamah Tinggi perlu mempertimbangkan fakta-fakta secara keseluruhan keadaan dan keterangan yang relevan untuk menentukan sama ada kontrak lisan boleh dibuktikan, memandangkan pelaksanaan spesifik hanya timbul sekiranya kontrak tersebut wujud.

Diputuskan, mengawardkan ganti rugi sebagai ganti perlaksanaan spesifik dengan kos:

(1) Plaintif pernah menghantar e-mel ('P3') kepada kawannya — PW2 — antara lain, menyatakan terma-terma tawaran yang dibuat oleh D1 dan secara spesifik menuntut nasihat D2 sama ada dia perlu membuat perjanjian tersebut secara bertulis berkaitan dengan tawaran yang dia bercadang untuk menerimanya. PW2 telah membalas melalui e-mel (P4) menasihatkan bahawa tiada keperluan untuk membuat kontrak bertulis dan bahawa kontrak lisan juga adalah sah. Kedua-dua e-mel ini, P3 dan P4 termasuk keterangan tawaran atau cadangan yang dibuat oleh D1 kepada plaintif dan balasan plaintif mengenainya. Respons PW2 (P4) kepada e-mel (P3) memberikan sokongan bebas fakta tawaran/cadangan. Dokumen-dokumen ini menunjukkan kewujudan kontrak lisan (lihat perenggan 6, 16 & 17).

(2) Plaintif dan D1 telah mendaftarkan sebuah perkongsian berkaitan dengan kerja-kerja kejuruteraan dan perkhidmatan. Ini menunjukkan keterangan tujuan pihak-pihak untuk mendirikan perniagaan bersama dan bahawa mereka berniat untuk mempunyai saham yang sama dalam perniagaan, yang berkaitan dengan kerja-kerja kejuruteraan. Fakta bahawa perniagaan belum dimulakan tidak mengurangkan tujuan pihak-pihak untuk memulakan perniagaan tersebut bersama-sama (lihat perenggan 18).

(3) Atas imbangan kebarangkalian, plaintif telah membuktikan bahawa terdapat kontrak lisan bersyarat yang mana D1 bersetuju untuk menjual 50% daripada saham-saham dalam D2 yang diperoleh daripada Balakrishnan, pada balasan RM150,000. Syarat terdahulu ialah pemerolehan 50% pegangan saham Balakrishnan dalam D2. Syarat terdahulu telah dipenuhi pada 8 Ogos 2006 yang mana perlaksanaan kontrak lisan adalah munasabah. Oleh itu Mahkamah Tinggi telah menyimpulkan bahawa kontrak lisan sebenarnya wujud

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di antara plaintif dan D1. Fakta bahawa tarikh sebenar kontrak tersebut sepertimana yang dinyatakan oleh plaintif sebenarnya tidak berapa tepat tidak menghalang mahkamah daripada mendapati kewujudan perjanjian tersebut. Terdapat keterangan preponderans yang menunjukkan kewujudan perjanjian tersebut. Dengan melanggar kontrak lisan tersebut, D1 secara jelas telah gagal dan/atau enggan memindahkan 50% pegangan saham dalam D2 kepada plaintif pada balasan yang dipersetujui RM150,000 (lihat perenggan 31). *GN Muey Muey v Goh Poh Choo* [2000] 2 SLR 578 dirujuk.

(4) Walaupun plaintif tidak mengabaikan tuntutannya untuk pelaksanaan spesifik kontrak lisan tersebut dan memaklumkan mahkamah bahawa dia boleh bekerja dengan D1, adalah jelas daripada keterangan D1 bahawa dia tidak mampu dan/atau tidak bersedia untuk bekerja dengan plaintif lagi. Dalam kes ini, s 18(2) Akta Relif Spesifik 1950 digunakan kepada fakta-fakta. Memandangkan kontrak tersebut telah dilanggar tetapi perlaksanaan spesifik bukanlah remedi yang sepatutnya diberikan, maka Mahkamah Tinggi memerintahkan ganti rugi sebagai ganti perlaksanaan spesifik sebagai remedi utama/relif dalam tindakan (lihat perenggan 33 & 34).]

Notes

For cases on damages, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5088–5093.

For cases on existence of oral agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4542–4544.

For cases on specific performance, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4548–4549.

Cases referred to

GN Muey Muey v Goh Poh Choo [2000] 2 SLR 578, CA (refd)

Legislation referred to

Contracts Act 1950 s 2
Evidence Act 1950 s 114(g)
Specific Relief Act 1950 s 18, 18(2)

Sugunan (Gomez & Associates) for the plaintiff.
CH So (CH So & Associates) for the defendants.

Nallini Pathmanathan JC:

INTRODUCTION

[1] The plaintiff in this action Thiagrajen a/l Veluchamy ('the plaintiff')

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seeks from this court an order of specific performance of an oral contract which he alleges to have existed between himself and the first defendant, Suraish Naidu a/l RE Naidu ('D1') for the sale of fifty per cent (50%) of the shares in the second defendant company, KJW Engineering Sdn Bhd ('D2') by D1 to him for a sum of Ringgit Malaysia One Hundred and Fifty Thousand (RM150,000). D1 however denies that there was ever any such oral contract entered into between the plaintiff and himself.

[2] The primary issue that arises for consideration in this case is whether or not an oral contract was entered into between the plaintiff and the defendant whereby the defendant agreed to sell 50% of his shareholding in D2 to the plaintiff for a sum of RM150,000 upon his acquisition of such shareholding from one Balakrishnan Iyavaloo. There is a direct conflict in the testimony of the plaintiff and D1 as to whether or not such an oral contract existed. In order to ascertain whether or not such a contract subsists, it is necessary for the court to consider the surrounding facts, circumstances and relevant evidence to ascertain whether an oral contract can be established. The issue of the grant of the remedy of specific performance only arises if indeed there exists such an oral contract between the plaintiff and D1.

SALIENT FACTS

[3] The salient facts of the case may be gleaned from the testimony of the plaintiff, one Kumar a/l Thangaraju PW2, Dato' Murthi PW3, the defendant, D1 and the company secretary, Tan Teck Chuan, DW2. The plaintiff and D1 have known each other since 1998. Sometime in early 2006 they decided to commence a business relating to the conduct of engineering works known as Bersatu Wira Engineering. Both the plaintiff and D1 testified that it was agreed between that they would each enjoy an equal 50% share in the said business. According to the defendant the agreed investment figure was RM150,000. They duly registered the business with its principal place of business being at a shop house at No 5, Solok Sultan Mohamad 1, Bandar Sultan Sulaiman, 42000 Pelabuhan Klang.

[4] However the business did not commence. Notwithstanding that the date of commencement in the business registry search states the date of commencement to be 6 March 2006, no business operations commenced on that day.

[5] Soon after this, on or around 17 March 2006, D1 sought the plaintiff's help with regards to problems he was encountering in his business conducted through D2. D2 is a private limited company in which D1 owns 50% of the shareholding and the aforesaid Balakrishnan owned at the time the other 50% shareholding in the company. D2 carried on the business of engineering

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works. Balakrishnan through his solicitors issued a letter dated 17 March 2006 to D1 stating that he did not intend to continue being a shareholder and director of D2. To that end he offered his 50% shares in D2 to D1 for a price of RM480,000. He gave D1 21 days to respond failing which he would sell the shares to other parties.

[6] The plaintiff testified that upon receipt of this letter, D1 sought the plaintiff's assistance to procure the services of a lawyer to act for him in this matter and to protect his interests. According to the plaintiff D1 also offered him Bala's 50% shareholding in D2 upon his acquisition of the same at a price of RM150,000. The reason for the reduction in the price of the shares was that D1 intended to remove some of the assets of D2 from the company leaving it with net tangible assets in the region of RM300,000. The plaintiff, in response, undertook to assist D1 and informed him that he needed two days to make a decision on the offer of the sale of the 50% shareholding in D2. The plaintiff then sought advice from PW2, his friend to procure the services of a practicing advocate and solicitor. He sent an e-mail dated 20 March 2006 to PW2 where he detailed D1's predicament. In para 3 of the said e-mail he set out the terms of the offer and specifically sought D2's advice as to whether or not he needed to get an agreement set out in writing in respect of the offer which he proposed to accept. PW2 responded to this e-mail the following day, advising that it was not necessary for the agreement to be reduced into writing as an oral contract was equally binding. The plaintiff maintains that he informed D1 of his acceptance of the offer of the sale of the 50% sale of the shareholding in D2 on 22 March 2006. This is wholly disputed by D1 who maintains that he did not make any such offer to the plaintiff.

[7] After this, from 23 March 2006 until 8 April 2006 the plaintiff and D1 were busy sorting out their strategy and plans to enable D1 to acquire the entire shareholding of D2. In order to do this, the plaintiff during this time ceased to carry out his activities as an insurance agent and delegated a considerable number of his taekwando activities to other instructors. According to him he also ceased his printing business. The plaintiff arranged for one Dato' Murthi of Chambers of Murthi & Partners to act for him in the acquisition of the 50% shareholding in D2 from Bala. To this end, the plaintiff personally ensured that the bank draft for the sum of RM480.000 being the purchase price of the shareholding was sent to Bala's solicitors on 7 April 2006. On the same day the plaintiff accompanied D1 to the premises of D2 and advised the employees that D1 was taking over the business entirely. The plaintiff was introduced as D1's new business partner and a director of D2. The following day, the plaintiff was elected a director of D2.

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[8] From 8 April 2006 until 8 August 2006, the plaintiff continued as a director of D2. He assisted and undertook the administrative duties and responsibilities of running D2. According to him he also sought new business for the company and liaised with suppliers and customers. In short he expended all his time in running the business of D2. Matters with the other shareholder, Bala did not proceed smoothly. This is because Bala changed his mind and sought to revoke his offer of the sale of his 50% shareholding in D2. Bala went so far as to procure an injunction to 'freeze' the bank accounts of D2. For some time the accounts of D2 were frozen, although D1 and the plaintiff took steps to change the authorised signatories of D2's bank accounts. The plaintiff contends that during the time the bank accounts were frozen he expended his personal monies to assist. This is denied by D1.

[9] Soon after this, D1 managed, through his solicitors to procure a dissolution of the injunction obtained by Bala. After this the business of D2 continued with the plaintiff and D1 drawing salaries and allowances as the directors of D2. Finally on 7 August 2006 the share sale dispute between D1 and Bala was resolved vide an order of court of the same date. D1 became the 100% shareholder of D2. The court order also provided for the carrying out of a one man meeting of the company to pass essential resolutions.

[10] A meeting in accordance with the court order was duly held at the offices of The Chambers of Murthi & Partners on 8 August 2006. The persons present at the meeting were D1, Major Murthi, the plaintiff for some part of the meeting, PW2 and the company secretary of D2, one Mr Tan Teck Seng, DW2. The immediate business of removing Balakrishnan as a director was undertaken and the requisite resolution passed.

[11] According to the plaintiff, D1 went on to declare that the 50% shareholding that had been transferred by Balakrishnan would be sold to the plaintiff as previously agreed. The fact of this declaration is seriously disputed by D1. When the issue of the cost of the 50% shareholding came up, D1 hesitated for some considerable time and did not answer. After a long pause, D1 announced to all present that he wished to change his mind. He wanted to retain 60% of the shareholding in D2 and offered to sell 40% of the shareholding only to the plaintiff. He did however offer to make payment of additional allowances and benefits to the plaintiff.

This latter offer is not in dispute.

[12] D1 explained that he was offering 40% of the shareholding of D2 because he did not want the problem he had had with Balakrishnan to repeat itself with the plaintiff, which could well occur if they both held an equal shareholding in D2. When the plaintiff heard D1's change of mind he left the meeting, rejecting D1's offer, as being in breach of the agreement that had

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been reached between them. Two days later he removed all his belongings from the premises of D2 under protest. The minutes of the meeting dated 8 August 2006 state that the plaintiff was removed as a director on that date. The plaintiff maintains that this did not happen in his presence and that he was never informed of the same. The Form 49 filed in the Registry of Companies stipulates that the date of removal of the plaintiff is 15 August 2006. It is also evident from the evidence of PW2 and PW3, Dato' Murthi, that the removal of the plaintiff as a director did not factually occur at the meeting on 8 August 2006. The company secretary subsequently explained that as the meeting was a one man meeting ordered by the High Court, he had recorded resolutions as required by D1. As a result, D1's wife was made a director in place of the plaintiff. These then are the salient facts relating to the dispute in this suit.

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ISSUE

[13] The sole issue that arises for consideration in this case is whether or not there subsisted an oral contract for the sale of 50% of the shareholding in D2 from D1 to D2 for a price of RM150,000. In order to ascertain this, it is necessary to consider and evaluate the relevant facts and circumstances that point to the existence or absence of such an oral contract. This is to be gleaned from the evidence of the various witnesses.

[14] The following facts and circumstances were relevant in considering whether or not an oral contract on the terms set out above did subsist:

EXISTENCE OF AN OFFER/PROPOSAL

[15] The e-mail from the plaintiff to Kumar a/l Thangaraju, PW2 dated 20 March 2006 and marked as exh P3 is relevant as it comprises a contemporaneous document incorporating the terms of the offer alleged to have been made to the plaintiff by D1. The salient part of the e-mail, at para 3 reads as follows:

> ... More importantly, he has asked me to join him as an equal partner with 50% shareholding. He promised me that if I can join him immediately as a partner/director in his company, I can takeover the 50% shares held by the other partner. The price has been agreed by both of us. His partner is selling his 50% shares which includes all the assets (shop house & money in bank). But Naidu wants to take the key assets for himself which will reduce the value of the company to about RM300,000. So the agreed price of the company is RM150,000 ...

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[16] This e-mail was issued by one 'Arsha nagaratnam' to PW2. When the plaintiff was queried during the course of cross-examination as to the identity of this Arsha Nagaratnam' he explained that that was his wife's name and that he shared an e-mail address with her. The plaintiff was also challenged as to whether or not he had actually issued or sent this e-mail to PW2 in view of the words '(Flag Message — Mark as Unread)' appearing at the top right hand corner of the e-mail. The plaintiff insisted that he had sent the e-mail to PW2.

[17] The issue of whether or not the e-mail reached PW2 is settled by the fact that PW2 issued a response to the aforesaid e-mail of 20 March 2006. In his response dated 21 March 2006, marked exh P4 Kumar advised that the plaintiff should not sign any agreement with D1 at that stage as D1 had not settled matters with Bala. He stated, inter alia, as follows:

> ... With regards to your partner Mr Naidu's issues, since the matter with his partner is not settled, I don't think its advisable to sign any agreement now. My suggestion is that you join his company and become a director as soon as possible. Once both of you are equal directors, everything will fall in line. However, for your satisfaction, let me tell you this. An oral or verbal agreement is just as valid as a written agreement. So his promise is as good as his bond ...

[18] These two e-mails, exhs P3 and P4 comprise evidence of the offer or proposal made by D1 to the plaintiff and the plaintiff's consideration of the same. PW2's response to the e-mail provides independent corroboration of the fact of the offer/proposal. The interpretation section of the Contracts Act 1950, s 2 stipulates, inter alia, as follows:

> '... (a) when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or absintence, he is said to make a proposal; ...'

[19] The e-mail response from PW2 also serves to explain why the plaintiff was satisfied to rely on the oral offer made by D1, without reducing it into writing. In any event at that stage, the 50% shareholding which D1 proposed to sell to the plaintiff was still held by Bala. Accordingly no actual transfer could have been effected at that stage. These documents therefore point towards the existence of an oral contract. It is relevant that PW2 was not cross-examined on his response in this e-mail of 21 March 2006. Neither was he cross-examined as to his receipt of the plaintiff's earlier mail of 20 March 2006.

[20] It is not in dispute that prior to March 2006, the plaintiff and D1 had decided to set up a partnership business dealing with the provision of engineering works and services. To this end they registered the business

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known as Bersatu Wira Engineering on 8 March 2006. The nature of business is stated to be 'Metal Foundries, Moulding And All Kind of Engineering Works' (see exh P1).

This evidences the intention of the parties to set up a business together. It also shows that the parties intended to have an equal share in the business, and that the nature of the business engineering works. While it does not determinatively show that an offer was made and that the plaintiff accepted the offer in relation to D2, it is important because it shows that the parties intended to commence an engineering works business together.

Finally it demonstrates that although the plaintiff had no formal training or background in engineering works, D1 was prepared to go into business with him. In other words, D1's contention that he would not have made any offer to the plaintiff because he is not trained in the field of engineering works, is less than credible given that he did in fact commence a business dealing in engineering works with the plaintiff. The fact that the business had not commenced cannot detract from the intention of parties to commence together such a business.

TERMS OF THE AGREEMENT — CERTAINTY

[21] The share sale price between the plaintiff and the defendant was agreed upon after D1 had removed from D2 certain valuable assets such as a shop house and monies in the bank. This in itself also suggests that the value of the 50% shareholding in D2 had been considered and discussed between the two of them.

CIRCUMSTANCES INDICATING EITHER THE EXISTENCE OR ABSENCE OF AN ORAL AGREEMENT

[22] The plaintiff contends that he accepted D1's offer on or around 22 March 2006. Again s 2 of the Contracts Act stipulates as follows:

> (b) when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted; a proposal when accepted becomes a promise;
>
> (c) the person making the proposal is called the 'promisor' and the person accepting the proposal is called the 'promisee'.

[23] The fact of the plaintiff's acceptance is not evidenced in anywhere in writing. It is therefore incumbent upon this court to consider the surrounding facts and circumstances to ascertain whether the parties conducted themselves in such that it may be inferred that such an oral agreement did in fact subsist, or that it did not. The following events to my

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mind are relevant in the evaluation of whether or not an oral agreement existed.

(a) The fact that on 7 April 2006 the plaintiff went to D2's premises, and was introduced as a potential director substantiates D1's intention to bring D2 in as a director and possibly shareholder of D2. On 8 April 2006, the plaintiff was appointed a director of D2. This fact also provides evidence of D1's consent to the plaintiff participating actively in the business of D2. To this end the monies paid out to both the plaintiff and D1 in equal shares also provides evidence of the intention of the parties to enjoy an equal position in D2.

(b) The fact that the plaintiff carried out all the administrative work in D2 and even dealt with Bala when he sought to re-enter the premises of D2 after he had formally left goes to show that the plaintiff shouldered the burden of protecting the business of D2 as well as D1's interests.

(c) That the plaintiff was made a signatory of both D2's bank accounts, although he was subsequently removed as signatory from one of the accounts, goes to show that the parties intended that he be an active participant in D2 to the extent of being responsible for its monies. Again this shows the intention of the parties for the plaintiff to be directly involved in the D2 which in turn substantiates the existence of an oral agreement on the terms stated by the plaintiff.

(d) At the meeting on 8 August 2006, according to the plaintiff, D1 initially declared that 50% of the shareholding in D2 would be sold to the plaintiff. It was only when the cost of this shareholding was being discussed that D1 paused for a significant length of time and then announced that he had changed his mind and that he was only prepared to sell 40% of the shareholding of D2 to the plaintiff. This evidence of the plaintiff is not borne out by the minutes of the meeting taken that day. However PW2 who was present corroborated the plaintiff's version of events entirely. It is evident from the evidence of PW2, which was not challenged that:

    (a) the minutes do not accurately reflect the events of that meeting of 8 August 2006; and

    (b) D1 did declare initially that 50% of the shareholding of D2 was to be transferred to the plaintiff.

[24] It is also not in dispute that D1 did offer a shareholding of 40% of D2 to the plaintiff at a price of RM150,000 because he did not want the problems he had encountered with Bala to recur again.

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These facts viewed cumulatively tend to show the existence of an oral agreement on terms as stated by the plaintiff, rather than an absence of any such agreement.

[25] The other relevant witnesses with regards to the events of 8 August 2006 were PW3 and DW2. PW3, Dato' Murthi who was present at the meeting, was unable to comment or give evidence on the precise events as they occurred that day as he was precluded by legal professional privilege from disclosing the same.

[26] To this end, permission was sought from D1 to allow disclosure of the events of the meeting but he refused to grant such permission. Accordingly PW3 was unable to comment directly or give evidence on this issue. However PW3 was able to state that the minutes of the meeting as taken by the company secretary Mr Tan Teck Seng, were not at all accurate. PW3 explained that apart from and after the removal of Bala as a director, none of the other matters set out in the minutes of the meeting of 8 August 2006 in fact took place. This corroborates PW2's version of events and establishes that the minutes were not an accurate version of events as they occurred that day.

[27] Mr Tan Teck Seng, DW2 maintained that his records of the minutes were accurate. However when directly asked by the court whether his minutes were a verbatim record of events as they took place on 8 August 2006, he answered that they were not. His understanding of the matter, it is clear from his evidence, is that as it was a one man meeting ordered by the High Court, his only duty as company secretary was to record resolutions as directed by D1. To that extent the minutes of the 8 August 2006 meeting do not reflect actual events as they transpired. As such those minutes cannot be relied upon to reflect as a matter of truth whether or not D1 did in fact declare that he was selling 50% of the shares to the plaintiff. In fact, the minutes do not even reflect a matter which is not in dispute between the plaintiff and D1, namely that D1 did in fact make an offer of 40% of the shareholding in D2 to the plaintiff and that it was refused. On the contrary the minutes state that the plaintiff was removed as a director and that the 50% shareholding from Bala was transferred in part to D1's wife and the balance directly to D1.

[28] (f) The evidence of PW2 in response to a question from the court as to the events of 8 August 2006 was particularly telling. It serves to corroborate the plaintiff's evidence that D1 did in fact declare that he was going to transfer 50% of the shareholding in D2 to the plaintiff. This is what PW2 said:

> ... When we arrived at Major Murthi's office, one Mr Tan the company secretary was also there. Mr Murthi assisted the company secretary to commence the one man meeting. The first resolution relating to Mr Bala was passed. Then when

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Dato' Murthi asked what are you going to do with the 50%, D1 said that he would transfer it to the plaintiff as agreed. Then while the secretary was taking notes, Major Murthi asked Mr Suresh (D1) to give a figure or value to it. This is when D1 went quiet, seemed to be in deep thought. When Major Murthi questioned him again, he said he would now like to change his mind and offer him 40%. He also said that he was saying this because he did not want what happened with his previous partner to recur again...

THE DEFENDANT, D1 CONTENDS THAT THERE WAS NO ORAL AGREEMENT

[29] D1 in his evidence maintained vehemently that no such oral agreement existed between the plaintiff and him. He testified that he knew the plaintiff because he sent his son for taekwando classes with him. He admitted that the plaintiff and he had decided to start Bersatu Wira Engineering at his premises. He explained he gave the plaintiff an opportunity to be his 50% business partner at a cost of RM150,000 but did not continue with the same, as the plaintiff had failed to pay up or invest the RM150,000 as required (in this context it is relevant that the plaintiff in the course of his evidence testified that he could come up with the RM150,000 required as his part of the investment).

[30] D1 explained that he had sought the plaintiffs assistance to procure the services of a competent advocate and solicitor to sort out his problems with his partner. He denied offering 50% shareholding in D2 to the plaintiff on the grounds that he had no experience in engineering works as he was a taekwando instructor. As for the plaintiff being appointed a director, he explained that he had done so in order that the plaintiff could carry out the administrative work as he was not conversant with English or Bahasa Malaysia. He maintained that he had paid the plaintiff as a director to carry out these works. D1 denied that the plaintiff contributed in any manner personally to D2. He placed significance on the fact that the plaintiff had no agreement in writing to evidence the oral agreement. He also contended that the plaintiff had made no attempt to have such an agreement reduced into writing, nor had he sought to have the company secretary prepare the requisite share transfer forms for any such proposed transfer. He finally relied on the minutes of the meeting of 8 August 2006 to deny that he had made any offer of 50% of the shareholding in D2 to the plaintiff either initially or otherwise. He did however admit to making an offer of 40% of the shareholding in D2 to him, which he stated was rejected. The offer had therefore lapsed. D1 also maintained that all the events as set out in the minutes of 8 August 2006 occurred as stated therein. When he was cross-examined as to why the incident relating to the offer of 40% of the shareholding to the plaintiff was not recorded despite both parties agreeing that it had occurred, his response was that he did not know but that the

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company secretary should answer this question. This conclusively showed that the minutes were not an accurate representation of the events of 8 August 2006.

[31] One of the main points put forward by D1 in support of his contention that he made no offer to the plaintiff was the fact that neither the plaintiff nor he had made any attempt to reduce the agreement they had reached into writing. Neither had the plaintiff instructed the company secretary to prepare share transfer forms to initiate the transfer of 50% of the shareholding to the plaintiff. However it is not in dispute that until the court order of 7 August 2006, D1 was in no position to effect the sale of 50% of the shareholding of D2 to the plaintiff because he was not then the owner of those shares. This is because until that date, there was a dispute with Bala in respect of the ownership of those shares.

As for instructing the company secretary to effect a transfer, this too was not possible because of the dispute with Bala. In any event the plaintiff was in no position to instruct the company secretary to effect such a transfer, as expressly conceded by the defendant.

The plaintiff could only seek to enforce the oral agreement upon D1's acquisition of the 50% shareholding in D2. And this the plaintiff sought to do, at the earliest possible opportunity on 8 August 2006.

[32] DW2's evidence confirmed that the minutes were not a verbatim report of the decisions taken that afternoon, but that as it was a one shareholder meeting, only what Suresh Naidu decided was recorded. He pointed out that it was not a board meeting and that therefore he was under no duty to record what had happened. He also confirmed that the instructions to record the resolutions at the 8 August 2006 meeting were not given to him only at that meeting.

[33] When the totality of the defence case is considered, it appears that while D1 concedes that several events leading to the plaintiff's active participation in D2 did in fact occur, there was no oral contract for the sale of 50% of the shares. From a consideration of his evidence it transpires that:

(i) There is no explanation accorded as to why D1 would enter into an engineering works business with the plaintiff in equal shares, yet later contend that he would not have offered a 50% share in D2 to him, because the plaintiff has no prior qualifications nor expertise in that business;

(ii) There is no cogent or credible explanation as to why the plaintiff was allowed to participate so actively in D2 at a time when D1 was having problems with Bala, to the extent of making him a director and cheque signatory. The explanation that he needed someone to do the

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administrative work does not warrant the plaintiff being made a director. He could have been hired as an employee;

(iii) No credible or rational explanation is forthcoming as to why D1 would suddenly agree to make an offer of 40% of the shareholding of D2 at the meeting on 8 August 2006, if indeed there existed no oral contract prior to that date. D1 is effectively saying that he simply agreed almost instantaneously to part with 40% of the shareholding of D2 on the premise that the plaintiff had asked for 50% and he felt obliged to agree to the plaintiff's request. The more credible explanation as borne out by the evidence of PW2 and the plaintiff is that he had brought down the shareholding from the prior agreed 50% to 40% because he did not want problems in the company to recur as they had with Balakrishnan;

(iv) There was no reason for D1 to refuse to allow PW3 to testify as to the actual occurrence at his offices on 8 August 2006. There was no client solicitor advice that required protection. PW3's evidence was sought to establish the course of events that transpired that day with a view to ascertaining whether or not D1 made a declaration of sale/transfer of 50% of the shareholding of D2 to the plaintiff. This would not impinge on confidential advice. Notwithstanding this, D1 refused to allow PW3 to testify. This refusal warrants the invoking of the presumption under s 114(g) of the Evidence Act 1950 that if such evidence had indeed been tendered, it would have proved unfavourable to D1. In this respect, PW2's evidence, as well as the plaintiff's evidence is consistent, namely that D1 first declared that he would sell 50% of the shares in D2 to the plaintiff as agreed previously.

DECISION

[34] On evaluating the evidence adduced in totality, on a balance of probability, it appears to this court that the plaintiff has established that there existed an oral contract whereby D1 agreed to sell 50% of the shares in D2 upon his acquisition of the same, at a consideration of RM150,000. In other words, there existed a conditional oral contract, the condition precedent being the acquisition of Balakrishnan's 50% shareholding in D2. That condition precedent was satisfied on 8 August 2006 whereupon the performance of the oral contract became possible. I therefore conclude that an oral contract did in fact exist between the plaintiff and D1 on the terms stated above. The fact that the exact date of the contract as stipulated by the plaintiff may not be exactly accurate does not preclude this court from finding the existence of such an agreement. This is because there is a preponderance of evidence showing the existence of such an agreement (see *GN Muey Muey v Goh Poh Choo* [2000] 2 SLR 578). The plaintiff has identified the approximate period during which the oral agreement was

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reached and the parties to this agreement. His evidence on this point was corroborated by the evidence of PW2.

The evidence of D1 was unsatisfactory because there was no overall consistency or explanation as to why events unfolded in relation to the plaintiff and D2 as they did.

[35] In breach of that oral contract, the defendant failed or refused to transfer the 50% shareholding in D2 to the plaintiff at the agreed consideration of RM150,000. This is amply borne out by the evidence of the plaintiff and corroborated by PW2. The fact that even D1 agrees that he made an offer of 40% of the shareholding to D2 evidences the fact of the breach.

RELIEF/REMEDY

[36] Having concluded that an oral agreement existed and that the defendant acted in breach of the same it remains to be considered whether or not specific performance of the oral contract ought to be granted. In the course of this trial it was apparent that the plaintiff did not abandon his claim for specific performance. When asked by the court whether he could work with the defendant his response was that he could. The issue for consideration by this court is whether or not specific performance would be the correct remedy in the context of this case.

If specific performance were awarded, the plaintiff and D1 would have to work together in the engineering business in which D2 is engaged. It is evident from the evidence of D1 that he is unable and/or unwilling to work with D1 any more.

Section 18 of the Specific Relief Act 1950 provides as follows:

(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.

(2) if in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff it shall award him such compensation accordingly.

(4) Compensation awarded under this section may be assessed in such a manner as the court may direct.

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(5) The circumstances that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

Subsection (2) is applicable on the factual matrix of this case for the reasons set out above. As the contract has been broken but as specific performance is not the appropriate remedy to be granted, it is adjudged that damages in lieu of specific performance be granted as the primary remedy/relief in this action. The court therefore grants the following order: in lieu of para (a) of para 52 of the statement of claim, the court awards damages in lieu of specific performance, such damages to be assessed by the senior assistant registrar. The plaintiff is also awarded the costs of this action as prayed for in para (j) of para 52 of the statement of claim. For avoidance of doubt, it is clarified that he court makes no order as prayed for in (b) or (i) as sought by the plaintiff.

Plaintiff awarded damages in lieu of specific performance with costs.

Reported by Andrew Christopher Simon